A

ISC TECHNOLOGY SDN BHD

v.

PREMIUM SYSTEMS TECHNOLOGY PTE LTD

B

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: S3-22-13-2000]
15 AUGUST 2007

C ***CIVIL PROCEDURE:*** *Jurisdiction - High Court - Action - Suit commenced against foreign company - Contract containing foreign jurisdiction clause in favour of Singaporean courts - Whether Malaysian courts seised with jurisdiction to try matter - Whether s. 23 of Courts of Judicature Act 1964 to apply - Whether jurisdiction of Malaysian court*
D *ousted - Whether court to decline jurisdiction*

CIVIL PROCEDURE: *Pleadings - Setting aside - Setting aside writ and statement of claim under O. 12 r. 7 Rules of the High Court 1980 for want of jurisdiction - Cause of action based on breach of contract -*
E *Foreign jurisdiction clause in contract in favour of Singapore courts - Whether jurisdiction of Malaysian courts ousted - Whether defendant could automatically apply to aside the writ under O. 12 r. 7 - Procedure for setting aside - Whether defendant ought to have first entered an unconditional appearance - Whether defendant ought to have applied for*
F *a stay of proceedings*

The defendant (a company registered in the Republic of Singapore) and the plaintiff (a company incorporated in Malaysia) had entered into a distributorship agreement ("the agreement").
G Subsequently the plaintiff filed this action in the High Court of Malaya against the defendant alleging breach of the agreement. The defendant applied under O. 12 r. 7 of the Rules of the High Court 1980 to set aside the writ of summons and the notice of writ of summons which was to be served out of jurisdiction and the statement of claim. The basis of the defendant's application
H was cl. 21 of the agreement which provided for the governing law to be the laws of the Republic of Singapore. The clause further provided that any dispute between the parties should be referred to a court of competent jurisdiction or arbitration in Singapore. The defendant claimed that by virtue of cl. 21, Malaysian Courts
I had no jurisdiction the try the dispute. The Senior Assistant Registrar dismissed the defendant's application and hence this appeal by the defendant to the judge in chambers.

Held (dismissing the appeal with costs):

(1) Just because of the existence of the provision of cl. 21 in the agreement it did not necessarily follow that the court had no jurisdiction at all over the dispute and that the defendant automatically had the right to make an application to set aside the writ under O. 12 r. 7. Whether the court had the jurisdiction or not to adjudicate over the dispute had to be determined by examining the content of the statement of claim and to test it against the provision of s. 23(1) of the Courts of Judicature Act 1964. If, by so doing, the court was satisfied that *prima facie* the High Court of Malaya had jurisdiction over the dispute then *prima facie* the court had the jurisdiction. (paras 7, 8 & 9)

(2) The proper cause of action which the defendant ought to have taken was to first enter an unconditional appearance and thereafter to apply for a stay of proceedings. Such granting of a stay is not a ruling to the effect that the Courts of Malaysia have no jurisdiction. (para 9)

(3) If, by virtue of s. 23(1) of the Courts of Judicature Act, Malaysian Courts do have the jurisdiction in the matter then this jurisdiction can never be ousted by a private stipulation such as cl. 21. The dispute was, by virtue of s. 23, *prima facie*, a matter within the jurisdiction of the High Court of Malaya and the defendant had not disputed this. (paras 9 & 11)

Case(s) referred to:
Globus Shipping & Trading Co (Pte) Ltd v. Taiping Textiles Bhd [1976] 1 LNS 31 FC ***(refd)***
The Eleftheria [1969] 2 All ER 641 ***(refd)***
The Fehmarn [1957] 2 All ER 707 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 23(1)
Rules of the High Court 1980, O. 12 r. 7

For the plaintiff - Yee Teck Fah; M/s Yee Teck Fah & Co
For the defendant - PC Loke; M/s Cheah Teh & Su

Reported by Amutha Suppayah

JUDGMENT

Hishamudin Mohd Yunus J:

[1] Enclosure 20 is an appeal to the judge in chambers by the defendant against the decision of the learned senior assistant registrar of 31 July 2001. On 31 July the senior assistant registrar had dismissed the defendant's application by way of summons in chambers to set aside:

(a) the writ of summons which is to be served out of jurisdiction;

(b) the notice of writ of summons which is to be served out of jurisdiction; and

(c) the statement of claim.

[2] I have dismissed the appeal with costs. I shall now give my grounds.

[3] The defendant is a company registered in the Republic of Singapore and has its principal place of business in Singapore. The plaintiff is a company incorporated in Malaysia and has its principal place of business in Petaling Jaya, Selangor. The plaintiff and the defendant entered into a distributorship agreement wherein the defendant agreed to grant to the plaintiff a non-exclusive and non-transferable licence to grant sub-licences to persons or corporations in Malaysia and Philippines to use the licensed products for a period of two years. The plaintiff had filed a writ of summons in the High Court of Malaya against the defendant alleging:

(a) that the defendant had in breach of the agreement terminated the agreement by a letter dated 20 August 1999;

(b) alternatively, that the defendant had by the said letter repudiated the agreement, which repudiation the plaintiff had accepted; and

(c) in the further alternative, that the defendant had unlawfully interfered with contractual relationships between the plaintiff and end users.

[4] In my judgment, the defendant's application to set aside the writ of summons, etc. is misconceived. The defendant's application is purportedly made pursuant to O. 12 r. 7 of the Rules of the High Court 1980. This provision reads:

7. (1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within 14 days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the notice on him out of the jurisdiction.

(2) An application under this rule must be made by summons.

[5] The basis of the defendant's application is cl. 21 of the agreement between the plaintiff and the defendant. This clause provides that the governing laws for the parties in respect of any dispute between them pertaining to the agreement are the laws of the Republic of Singapore. This clause further provides that any dispute between the parties should be referred to a court of competent jurisdiction in Singapore or to arbitration in that country. The clause in question reads:

21. **GOVERNING LAW AND ARBITRATION**

21.1 This Agreement shall be construed and interpreted in accordance with the laws of the Republic of Singapore for every purpose.

21.2 Any dispute difference or question which may arise at any time hereafter between the Principal (the defendant) and the Distributor (the plaintiff) touching the true construction of this Agreement or the rights and liabilities of the parties hereto shall unless otherwise herein expressly provided be referred to a court of competent jurisdiction in Singapore or to the decision of a single arbitrator to be agreed upon between the parties or in default of Agreement for fourteen days to be appointed at the request of either party by the Chairman of Singapore International Arbitration Act in accordance with and subject to the provisions of the Arbitration Act or any statutory modification or re-enactment thereof for the time being in force.

[6] It is the contention of the defendant that by virtue of the above cl. 21 Malaysian Courts have no jurisdiction to try the dispute between the plaintiff and the defendant. The defendant's/applicant's grounds in their summons in chambers (at encl. 14) read:

A The grounds of the application are as follows:

1. The Plaintiff's cause of action is not under the jurisdiction of the High Court of Malaya at Kuala Lumpur.

2. Plaintiff's claim against the Defendant (if any) is within the
B jurisdiction of Singapore Court only.

[7] I am of the view that just because of the existence of the provision of cl. 21 in the distribution agreement it does not necessarily follow that this court has no jurisdiction at all over the
C dispute between the plaintiff and the defendant and that the latter automatically has the right to make an application to set aside the writ under O. 12 r. 7.

[8] In my opinion, whether this court has the jurisdiction or not to adjudicate over the dispute must be determined by examining
D the content of the statement of claim and to test it against the provision of s. 23(1) of the Courts of Judicature Act 1964. Section 23(1) states:

23.(1) Subject to the limitations contained in Article 128 of the
E Constitution every High Court shall have jurisdiction to try all civil proceedings where:

(a) the cause of action arose; or

(b) the defendant or one of several defendants resides or has his
F place of business; or

(c) the facts on which the proceedings are based exist or are alleged to have occurred; or

(d) any land the ownership of which is disputed, within the local
G jurisdiction of the Court ...

[9] If, by so doing, the court is satisfied that *prima facie* the High Court of Malaya has jurisdiction over the dispute then *prima facie* this court has the jurisdiction. The point that I wish to stress
H here is that the issue of jurisdiction can never be determined merely by pointing to the existence of such a clause as cl. 21 alone. And in this regard, it is significant to note in the present case that the defendant never contends that this court has no jurisdiction by virtue of s. 23. As I have said earlier, the only basis
I for the defendant's contention that this court has no jurisdiction over the dispute is simply the existence of cl. 21. And this then being the position, that is to say, the defendant taking the position

that by virtue of cl. 21 the matter should be adjudicated in the Republic of Singapore, to my mind, the proper cause of action open to the defendant – and which they ought to have taken – is for the defendant to first enter an unconditional appearance and thereafter to apply for a stay of proceedings – as was done by the applicant in *The Eleftheria* [1969] 2 All ER 641. And, if eventually the court, based on cl. 21 and the merits of the stay application, were to hold that the proper forum would be the courts of Singapore, it would grant the stay as prayed for, to enable the plaintiff to file the action in the appropriate court in the Republic of Singapore; but it is of crucial importance to appreciate that such granting of a stay is not a ruling to the effect that the Courts of Malaysia have no jurisdiction to adjudicate on the dispute: the granting of the stay is merely the giving of effect to what parties have agreed upon in the distribution agreement. For if, by virtue of s. 23(1) of the Courts of Judicature Act, Malaysian Courts do have the jurisdiction in the matter then this jurisdiction can never be ousted by a private stipulation such as cl. 21. As what Lord Denning (delivering the judgment of the Court of Appeal) in *The Fehmarn* [1957] 2 All ER 707 said (at p. 710, a passage approved by the Federal Court in *Globus Shipping & Trading Co. (Pte) Ltd. v. Taiping Textiles Bhd.* [1976] 1 LNS 31):

> The next question is whether the action ought to be stayed because of the provision in the bill of lading that all disputes are to judge by the Russian courts. I do not regard this provision as equal to an arbitration clause, but I do say that the English courts are in charge of their own proceedings: and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the over-riding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them.

[10] It follows then that in the present case it is inappropriate legally and procedurally for the defendant to apply to set aside the writ pursuant to O. 12 r. 7 in a situation where the defendant is merely relying on cl. 21 but apart from that does not dispute that, based on the pleaded facts and s. 23, Malaysian Courts do have jurisdiction over the matter.

[11] In the present case, from the statement of claim (assuming for the moment that the facts averred in the statement of claim are true), it is clear that the dispute is, by virtue of s. 23 of the Courts of Judicature Act, *prima facie*, a matter within the jurisdiction of the High Court of Malaya; and the defendant does not appear to dispute this. In fact, the defendant, in the summons in chambers at encl. 14 and the supporting affidavit at encl. 13, makes no mention at all of s. 23, and that the defendant is merely relying on cl. 21. The plaintiff, on the other hand, in their statement of claim as well as in their affidavit in opposition, takes pain to state:

(a) that the substance of the plaintiff's claim concerned the marketing of computer software product in Malaysia and Philippines;

(b) that all the essential witnesses are within the jurisdiction of the High Court of Malaya;

(c) that all evidence on the issues of facts are readily available within the jurisdiction of the High Court of Malaya;

(d) that the execution and termination of the Distribution agreement were both in Malaysia; and

(e) that the tort of unlawful interference with contractual relationship was committed within the jurisdiction of the High Court of Malaya.

[12] In *The Eleftheria*, Brandon J set out the principles (at p. 645) to guide the courts when dealing with an agreement containing such a clause as cl. 21:

> The principles established by the authorities can, I think, be summarised as follows: (I) where plaintiff's sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (II) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (III) The burden of proving such strong cause is on the plaintiff's. (IV) In exercising its discretion, the court should take into account all the circumstances of the particular case. (V) In particular, but without prejudice to (IV), the following matters, where they arise, may properly be

regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiff's would be prejudiced by having to sue in the foreign court because they would – (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

[13] The above case and principles were cited with approval by the Federal Court in *Globus Shipping & Trading Co. (Pte) Ltd.*.

[14] In conclusion, I hold that it is misconceived on the part of the defendant to contend that the very existence of cl. 21 by itself automatically takes the dispute between the parties away from the jurisdiction of the Malaysian Courts. Hence, I further hold that it is procedurally wrong for the defendant to have invoked O. 12 r. 7. Whether or not Malaysian Courts have jurisdiction over the dispute, such an issue must only be judged and determined by reference to s. 23(1) of the Courts of Judicature Act.

[Appeal dismissed with costs.]